IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 10TH AUGUST 2007 / 19TH SRAVANA 1929

CRL.A.No. 1154 of 2007()

SC.412/2006 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA

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APPELLANT:

KOMALABALAN,C.NO.4395,
CENTRAL JAIL,KANNOOR.

BY ADV. INNOCENT FRANCIS PAPALI[STATE BRIEF]

RESPONDENT:

STATE OF KERALA REPRESENTED BY
SULTHAN BATHERY EXCISE RANGE,
CR.NO.21/05

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 1154 of 2007

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Dated this the 10th day of August, 2007

JUDMENT

The sole accused in S.C.No.412/2006 on the file of the Court of the Addl. Sessions Judge (Adhoc)-II, Kalpetta is the appellant. He was charge-sheeted for the offences punishable under section 8(1) and (2) of the Abkari Act on the allegation that he was found in possession of 4 litres of arrack intended for sale. To prove the charge against the appellant, the prosecution examined PWs.1 to 4 and Exts.P1 to P6 and MO1 were marked. After closing the evidence of the prosecution, the appellant was questioned under section 313 Cr.P.C. He denied the prosecution allegation levelled against him and stated that he was innocent and the case was foisted against him only for the reason that he was made an accused in an earlier abkari case. Relying on the evidence adduced by the prosecution, the trial court found that the appellant was guilty of the offences punishable under sections 8 (1) and (2) of the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for two years and to pay

a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for a further period of six months. The benefit under section 428 Cr.P.C. was also granted to the appellant. The conviction and sentence awarded against the appellant are under challenge in this appeal.

2. Since the appeal is filed through the jail authorities, a member from the Sate Brief panel has been appointed to defend the case of the appellant.

3. This Court heard learned counsel for the appellant and learned Public Prosecutor.

4. The learned counsel for the appellant has contended as follows:-Firstly, it is contended that the trial court has committed serious error in relying on the evidence of PWs.1 and 2 official witnesses to find the appellant guilty, as the independent witnesses were not supporting the prosecution case. Secondly, it is contended that while detecting the offence PW1, Excise Inspector, did not comply with the provisions of the Abkari Act and the Kerala Excise Manual. Thirdly, it is contended that the prosecution had not proved

the identity of the appellant, as the prosecution has failed to establish that the appellant was the person who run away from the place of occurrence.

5. Considering the contentions raised by the learned counsel for the appellant, evidence of PWs.1 and 2 has to be analyzed. PW1 is the Excise Inspector who stated that on 13-4-2005 while himself and party were on patrol duty, he received information that the appellant was selling arrack. He along with excise officials proceeded through Kallunkara Colony road and when they reached the colony road, they found the appellant near his house carrying a plastic can. He also stated that on seeing them, the appellant dropped the can and ran away. However, after preparing Ext.P1 mahazar MO1 can was seized and sample was taken in the presence of independent witnesses and a case was registered against the appellant. As per Ext.P5 chemical analysis report, the sample contained 32.44% of ethyle alcohol.

6. PW2, Excise Guard, stated that he accompanied PW1 on 13-4-2005. He deposed that he was present at the time of the detection of the offence. He also stated that when the appellant ran away

abandoning the can, he was asked to keep the can. He also stated that the can contained arrack. He identified MO1 can.

7. In Ext.P1 it is stated that ഒരാൾ തന്റെ വലത ുകൈയിൽ ഒര ു കറുത്ത കന്നാസ് തൂക്കിപ്പിടിച്ച് ടിറോഡിലൂടെ ഞങ്ങൾക്ക് അഭിമ ുഖമായി വരുന്നതുകണ്ടു. ഞങ്ങളെ കണ്ടമാത്രയിൽ ടിയാൻ തന്റെ വലതുകൈയ്യിലുണ്ടായിരുന്ന കന്നാസ് നിലത്ത് ഇട്ടിട്ട് ഓട ുന്നത് കണ്ട് ഞങ്ങൾ വാഹനം നിർത്തി. With regard to this, the evidence of PW3 is important. PW3 stated that "എക്സൈസുകാർ വര ുമ്പോൾ ഞാൻ പ്രതിയുടെ പറമ്പിൽ ആയിര ുന്നു. അന്ന് ചാരായം അടങ്ങിയ ക ുപ്പി കണ്ട ു. കന്നാസ് ഞാൻ കണ്ടില്ല. PW3 also stated that he did not see the appellant running away from the place of occurrence. He was declared hostile to the prosecution. If the evidence of PWs.1 and 2 has to be analyzed, there is no conclusive evidence to show that the appellant was the person who abandoned the can. The evidence of PWs.1 and 2 would show that they could not chase the appellant. PW1 stated that "പ്രതിയുടെ പേരിൽമറ്റൊര ു അബ്ക്കാരി കേസ് ഉണ്ടായിര ുന്നു. അങ്ങനെ പരിചയം ഉണ്ട്. It is also to be noted that in Ext.P1 it is stated that the witnesses who came to the spot stated that the person escaped from the

scene was the appellant. In cross-examination PW1 admitted that "ഓടിപ്പോയ ആളെപ്പറ്റി സാക്ഷികളോട് ചോദിച്ചതിൽ കോമളബാലൻ എന്നുവിളിക്കുന്ന ബാലകൃഷ്ണൻ ആണെന്ന് പറഞ്ഞു. Considering all these aspects, there is no evidence to show that the appellant himself was the person who ran away from the place of occurrence abandoning the can. In this context, 313 statement of the appellant is relevant. In 313 statement the appellant stated that the case was foisted against him only for the reason that he was made an accused in an earlier abkari case. The only independent witness examined in the case did not support the case of the prosecution. CW6 who had signed as witness to Ext.P1 was not examined. Hence, the contention of the learned counsel that the prosecution has not proved the identity of the appellant is sustainable. Hence, the finding entered by the trial court that the appellant had committed an offence under section 8(1) and (2) of the Abkari Act is liable to be set aside.

8. In the result, the conviction and sentence awarded against the appellant/accused in S.C.No.412/2006 on the file of the Court of the Addl. Sessions Jude (Adhoc) II, Kalpetta are set aside and the

appellant is acquitted. Hence, the appellant shall be released forthwith unless required in any other case.

K. Thankappan,
Judge.

K. Thankappan,J.

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Crl.A. No. 1154/2007

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Judgment
10-8-2007